



1 John B. McEntire, IV
2 *Senior Litigator*
3 10 North Post Street, Suite 700
4 Spokane, Washington 99201
5 509.624.7606
6 Attorney for James D. Cloud
7
8
9

United States District Court
Eastern District of Washington
Honorable Mary K. Dimke

10 United States of America,

11 No. 1:19-CR-2032-SMJ-1

12 Plaintiff,

13 Renewed Motion to Enter Due
14 Process Protection Act Order

v.

James Dean Cloud,

15 November 23, 2020 – 2:30 p.m.

16 Defendant.

17 Yakima – With Argument

I. Introduction

On October 21, 2020, the Due Process Protections Act was signed into law, requiring judges to issue oral and written orders confirming not only a prosecutor’s disclosure obligations under *Brady*¹ and its progeny, but also the consequences for violating those obligations. *See* Fed. R. Crim. P. 5(f) (2020); Pub. L. No. 116-182 (2020). Because the Act “became effective upon enactment,” the Administrative Office of the U.S. Courts advised that “all judges must immediately comply with this new requirement. . . .”²

In response to the DPPA, James Cloud filed a Motion to Enter Due Process Protection Act Order on October 29,³ but the district court denied it on November 2, finding “[t]he Act does not apply retroactively to all criminal proceedings instituted before its date of enactment.”⁴

On November 17, a grand jury returned a Third Superseding Indictment,⁵ triggering an arraignment at 2:30 p.m. on November 23 before the Court.⁶ Because this arraignment brings all the parties together to review the new charges, this seems

¹ See *Brady v. Maryland*, 373 U.S. 83 (1963).

² See October 26, 2020 Memorandum from James C. Duff to all United States Judges at Page 2, attached as Exhibit A.

³ ECF No. 227 (James Cloud's DPPA Motion).

⁴ ECF No. 229 (Text Order).

⁵ ECF No. 242 (Third Superseding Indictment).

⁶ ECF No. 247 (Notice of Hearing).

1 an appropriate venue for the Court to issue both written and oral *Brady* warnings, as
2 the DPPA requires.

3 There are several reasons this motion is properly before the Court:

4 **First**, this is not a closed case; this is not a post-plea case; this is a live, pretrial
5 case returning to the Court for initial proceedings (an arraignment on new charges),
6 which is when Congress envisioned judges would remind prosecutors about their
7 *Brady* obligations.

8 **Second**, traditional retroactivity concerns aren't present. The DPPA doesn't
9 involve criminal punishments, so the Ex Post Factor Clause isn't implicated. *See*
10 *Johannessen v. U.S.*, 225 U.S. 227, 242 (1912) (noting the Ex Post Facto Clause's
11 "prohibition is confined to laws respecting criminal punishments, and has no
12 relation to retrospective legislation of any other description.").

13 The DPPA also doesn't announce new rules, as Congress made clear the
14 DPPA simply "reinforce[s] the government's already existing constitutional
15 obligation to disclose exculpatory evidence." *See* Congressional Proceedings, 166
16 Cong. Rec. H4582-01, 2020 WL 5641902 (Sep. 21, 2020).

17 **Third**, entering a DPPA order follows Congressional intent. During floor
18 debate, the DPPA's sponsor stated the bill would do "three very vital things,"
19 including amending the criminal procedural rules to "require that a judge issue an

1 order to prosecution and defense counsel that confirms the disclosure obligation of
2 the prosecutors in every criminal case. . . .” *Id.* Of the three vital things mentioned
3 during debate, timing wasn’t one of them. That is, Congress didn’t so much care
4 **when** courts issued *Brady* warnings (although it makes sense to do it at a case’s
5 outset, which is why the DPPA was filed under Rule 5); but Congress did care
6 **whether** courts issued *Brady* warnings.

7 Turning to what the Court’s DPPA order should contain, it helps to look at
8 the Act’s legislative history, Ninth Circuit authority, Supreme Court authority, and
9 federal prosecutors’ ethical obligations.

10 II. Discussion

11 A. Congress passed the Act to address ongoing *Brady* violations.

12 The Act’s provenance rests on a bipartisan belief that, despite well-settled
13 case law requiring prosecutors to turn over favorable evidence, prosecutors continue
14 to “conceal” exculpatory evidence. *See* Congressional Proceedings, 166 Cong. Rec.
15 H4582-01, 2020 WL 5641902 (Sep. 21, 2020). To illustrate the point during floor
16 debate, lawmakers described DOJ’s high-profile failure to honor its constitutional
17 obligations during then-Senator Ted Stevens’s corruption trial, where prosecutors
18 concealed exculpatory evidence, ultimately leading to dismissal. *Id.*

1 DOJ's misconduct wasn't a one-off: this has been a year of extraordinary
2 *Brady* violations.

3 In August 2020, the Ninth Circuit addressed *Brady* violations in a high-profile
4 case stemming from a stand-off between Cliven Bundy and the government over
5 cattle-grazing rights. *See U.S. v. Bundy*, 968 F.3d 1019 (9th Cir. 2020). After trial
6 began, allegations surfaced the United States withheld discovery central to Bundy's
7 defense. The district court held several evidentiary hearings on the withheld
8 discovery, ultimately finding the United States' "*Brady* violations were so egregious
9 and prejudicial that the indictment needed to be dismissed with prejudice." *Id.* at
10 1030. The United States appealed, and the Ninth Circuit affirmed, finding "the
11 government fell well short of its obligations to work toward fairly and faithfully
12 dispensing justice rather than simply notching another win." *Id.* at 1041.

13 The month following the *Bundy* opinion, September 2020, the Honorable
14 Alison Nathan addressed *Brady* violations in a high-profile fraud case. *See U.S. v.*
15 *Nejad*, __ F. Supp. 3d __, 2020 WL 5549931 (S.D.N.Y. Sep. 16, 2020). Before,
16 during, and after trial, the United States "made countless belated disclosures of
17 arguably (and, in one instance, admittedly) exculpatory evidence." *Id.* at 1. The
18 United States recognized its failures and agreed Judge Nathan should vacate
19 Mr. Sadr's guilty verdict. *See id.*

1 What struck Judge Nathan wasn't the United States' willingness to dismiss
2 the case, but rather the depth of the United States' bad-faith. During trial, the
3 United States realized it failed to turn over exculpatory material, but "[i]nstead of
4 immediately disclosing that file, Government lawyers spent almost twenty hours
5 strategizing how best to turn it over," ultimately agreeing they should "'bury' the
6 *evidence* along with other, already-disclosed documents" *Id.* at 2 (emphasis
7 added). This did not sit well with Judge Nathan, as she openly ruminated how best
8 to sanction prosecutors for their admitted wrongdoing.

9 These two decisions (*Bundy* and *Nejad*), just a month apart, show Congress's
10 concerns about prosecutors failing to disclose exculpatory material remain relevant.

11 **B. Congress passed the Act to provide trial courts with disciplinary options.**

12 Lawmakers weren't just troubled by DOJ concealing evidence in then-Senator
13 Ted Stevens's case; they were equally-troubled by district court's inability to
14 sanction prosecutors for their misconduct. The inability to sanction, lawmakers
15 noted, stemmed from the lack of a "direct written court order requiring
16 [prosecutors] to abide by their ethical and constitutional obligations to disclose
17 favorable evidence." Congressional Proceedings, 166 Cong. Rec. H4582-01, 2020
18 WL 5641902 (Sep. 21, 2020).

1 Finding the lack of a standing *Brady* order troubling, lawmakers surveyed
2 federal judicial districts to determine how many employ standing *Brady* orders. *See*
3 *id.* They uncovered a patchwork of protections, with only 38 of 94 Federal districts
4 using local rules and standing orders to confirm prosecutors' *Brady* obligations. *See*
5 *id.* This patchwork, lawmakers concluded, failed "to ensure that this practice is
6 followed across the country." *Id.*

7 So they acted.

8 **C. Congress wants substantive *Brady* orders, not rote reminders.**

9 Congress's changes to Rule 5's language are minor; its expectations on what
10 *Brady* orders should contain are not. These heightened expectations surfaced during
11 floor debate, when lawmakers called attention to the District of Columbia, which
12 folded a *Brady* order into the local rules in the wake of the botched Stevens
13 prosecution. The District of Columbia's local rule (LCrR 5.1) is no rote reminder;
14 rather, it details the United States' disclosure obligations:⁷

15
16
17
18
19 ⁷ https://www.dcd.uscourts.gov/sites/dcd/files/LocalRulesJuly_2019.pdf, last accessed on
October 29, 2020.

1 **LCrR 5.1**2 **DISCLOSURE OF INFORMATION**

3 (a) Unless the parties otherwise agree and where not prohibited by law, the government shall
4 disclose to the defense all information “favorable to an accused” that is “material either to
5 guilt or to punishment” under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and that is
6 known to the government. This requirement applies regardless of whether the
7 information would itself constitute admissible evidence. The information, furthermore,
8 shall be produced in a reasonably usable form unless that is impracticable; in such a
9 circumstance, it shall be made available to the defense for inspection and copying.
10 Beginning at the defendant’s arraignment and continuing throughout the criminal
11 proceeding, the government shall make good-faith efforts to disclose such information to
12 the defense as soon as reasonably possible after its existence is known, so as to enable the
13 defense to make effective use of the disclosed information in the preparation of its case.
14

15 (b) The information to be disclosed under (a) includes, but is not limited to:
16

17 (1) Information that is inconsistent with or tends to negate the defendant’s guilt as to
18 any element, including identification, of the offense(s) with which the defendant
19 is charged;

20 (2) Information that tends to mitigate the charged offense(s) or reduce the potential
21 penalty;

22 (3) Information that tends to establish an articulated and legally cognizable defense
23 theory or recognized affirmative defense to the offense(s) with which the
24 defendant is charged;

25 (4) Information that casts doubt on the credibility or accuracy of any evidence,
26 including witness testimony, the government anticipates using in its case-in-chief
27 at trial; and

28 (5) Impeachment information, which includes but is not limited to: (i) information
29 regarding whether any promise, reward, or inducement has been given by the
30 government to any witness it anticipates calling in its case-in-chief; and (ii)
31 information that identifies all pending criminal cases against, and all criminal
32 convictions of, any such witness.

33 (c) As impeachment information described in (b)(5) and witness-credibility information
34 described in (b)(4) are dependent on which witnesses the government intends to call at
35 trial, this rule does not require the government to disclose such information before a trial
36 date is set.

- 1 (d) In the event the government believes that a disclosure under this rule would compromise
2 witness safety, victim rights, national security, a sensitive law-enforcement technique, or
3 any other substantial government interest, it may apply to the Court for a modification of
4 the requirements of this rule, which may include *in camera* review and/or withholding or
5 subjecting to a protective order all or part of the information.
- 6 (e) For purposes of this rule, the government includes federal, state, and local law-
7 enforcement officers and other government officials who have participated in the
8 investigation and prosecution of the offense(s) with which the defendant is charged. The
9 government has an obligation to seek from these sources all information subject to
10 disclosure under this Rule.
- 11 (f) The Court may set specific timelines for disclosure of any information encompassed by
12 this rule.
- 13 (g) If the government fails to comply with this rule, the Court, in addition to ordering
14 production of the information, may:
 - 15 (1) specify the terms and conditions of such production;
 - 16 (2) grant a continuance;
 - 17 (3) impose evidentiary sanctions; or
 - 18 (4) enter any other order that is just under the circumstances.

11 While the District of Columbia's Local Criminal Rule 5.1 is a solid
12 benchmark, the Court's DPPA order here would need to be tweaked in a few ways:

13 *First*, it would need to unmoor itself from *Brady*'s definition of "materiality,"
14 which is an appellate standard. Time-and-time again, the Ninth Circuit has noted
15 "the retrospective definition of materiality is appropriate only in the context of
16 appellate review, and that trial prosecutors must disclose favorable information
17 *without* attempting to predict whether its disclosure might affect the outcome of the
18 trial." *U.S. v. Olsen*, 704 F.3d 1172, 1183 n.3 (9th Cir. 2013) (emphasis added).

1 Thus, prosecutors cannot attempt to later excuse *Brady* violations by claiming “I
2 didn’t know it was material.”

3 **Second**, it would need to capture that prosecutors’ disclosure obligations
4 apply not only to trials, but also to pre-trial and sentencing hearings as well. *See, e.g.*,
5 *U.S. v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000) (recognizing *Brady* applies
6 to suppression hearings); *see also Edwards v. Ayers*, 542 F.3d 759, 768 (9th Cir. 2008)
7 (recognizing *Brady* applies to sentencing hearings).

8 **Third**, it would need to capture that, under *Brady*, prosecutors have “a duty
9 to learn of any favorable evidence known to the others acting on the government’s
10 behalf in [a] case, including the police.” *Strickler v. Greene*, 527 U.S. 263, 280-81
11 (1999).

12 **Fourth**, it would need to expand prosecutors’ disclosure obligations to
13 harmonize with Washington’s ethical rules. Federal prosecutors in the Eastern
14 District of Washington are bound by Washington’s rules of professional conduct.
15 *See* 28 U.S.C. §530B(a) (“An attorney for the Government shall be subject to State
16 laws and rules, and local Federal court rules, governing attorneys in each State
17 where such attorney engages in that attorney’s duties, to the same extend and in the
18 same manner as other attorneys in that State.”). Washington’s RPC 3.8, which
19

1 outlines a prosecutor's "special responsibilities," requires prosecutors to disclose
2 information above-and-beyond *Brady*:

3

4 **RPC 3.8**
SPECIAL RESPONSIBILITIES OF A PROSECUTOR

5 The prosecutor in a criminal case shall:

6 (a) refrain from prosecuting a charge that the prosecutor knows is not supported by
probable cause;

7 (b) make reasonable efforts to assure that the accused has been advised of the right to, and
the procedure for obtaining, counsel and has been given reasonable opportunity to obtain
8 counsel;

9 (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights,
such as the right to a preliminary hearing;

10 (d) make timely disclosure to the defense of all evidence or information known to the
prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in
connection with sentencing, disclose to the defense and to the tribunal all mitigating information
11 known to the prosecutor, except when the prosecutor is relieved of this responsibility by a
protective order of the tribunal;

12 With these tweaks in mind, James Cloud proposes the following language, which
13 melds the District of Columbia's local rule with Ninth Circuit authority, Supreme
14 Court authority, and Washington's RPCs:

15 **Disclosure of Information**

16 Unless the parties agree and where not prohibited by law, the government
17 shall timely disclose to the defense all evidence or information known to the
18 government that tends to negate the guilt of the accused or mitigates the offense.

19 "Timely" means that, beginning at the defendant's arraignment and

1 continuing throughout the criminal proceeding, the government shall make
2 good-faith efforts to disclose such information to the defense as soon as reasonably
3 possible after its existence is known, so as to enable the defense to make effective
4 use of the disclosed information in the preparation of its case.

5 These requirements apply regardless of whether the information would itself
6 constitute admissible evidence. These requirements also apply to all court
7 proceedings, including pretrial hearings, trial, and sentencing.

8 The information, furthermore, shall be produced in a reasonably usable form
9 unless that is impracticable; in such a circumstance, it shall be made available to the
10 defense for inspection and copying.

11 The exculpatory information to be disclosed includes, but is not limited to,
12 the following:

- 13 1) information that is inconsistent with or tends to negate the defendant's
14 guilt as to any element, including identification, of the offense(s) with
15 which the defendant is charged;
- 16 2) information that tends to mitigate the charged offense(s) or reduce the
17 potential penalty or guideline range;
- 18 3) information that tends to establish an articulated and legally-cognizable
19 defense theory or recognized affirmative defense to the offense(s) with
which the defendant is charged;
- 20 4) information that casts doubt on the credibility or accuracy of any evidence,
including witness testimony;
- 21 5) impeachment information, which includes, but is not limited to—
22
 - 23 a. information regarding whether any promise, reward, or inducement

Renewed DPPA Motion

1 has been given or will be given later by the government to any
2 witness;

3 b. information that identifies all pending criminal cases against, and all
4 criminal convictions of, any witness, and a copy of any criminal
record of any witness, identifying by name each such witness;

5 c. any inconsistent statement, or a description of such a statement,
6 made orally or in writing by any witness, regarding the alleged
criminal conduct of the defendant;

7 d. information reflecting bias or prejudice against the defendant by any
8 witness;

9 e. a written description of any prosecutable federal offense known by
10 the government to have been committed by any witness;

11 f. a written description of any conduct that may be admissible under
12 Fed. R. Evid. 608(b) known by the government to have been
committed by a witness; and

13 g. information known to the government of any mental or physical
14 impairment of any witness whom the government anticipates calling
15 in its case-in-chief that may cast doubt on the ability of that witness
to testify accurately or truthfully at trial as to any relevant event.

16 6) information potentially relevant to pre-trial motions, including but not
17 limited to motions to suppress, dismiss, or *in limine*; and

18 7) no later than the close of the defendant's case, the government shall
disclose any exculpatory information relevant to rebuttal.

19 In the event the government believes that a disclosure under this rule would

Renewed DPPA Motion

1 compromise witness safety, victim rights, national security, a sensitive law-
2 enforcement technique, or any other substantial government interest, it may apply
3 to the Court for a modification of the requirements of this rule, which may include in
4 camera review and/or withholding or subjecting to a protective order all or part of
5 the information. The government shall notify the defense of any such application.

6
7 For purposes of this rule, the government includes federal, state, and local law
8 enforcement officers and other government officials who have participated in the
9 investigation and prosecution of the offense(s) with which the defendant is charged.
10 The government has an obligation to seek from these sources all information subject
11 to disclosure under this Rule.

12
13 If the government fails to comply with this rule, the Court, in addition to
14 ordering production of the information, may:

15
16
17
18
19

- (1) specify the terms and conditions of such production;
- (2) grant a continuance;
- (3) impose evidentiary sanctions;
- (4) enter any other order that is just under the circumstances.

III. Conclusion

20
21 Congress did not enact the Due Process Protection Act so courts could enter
22 gentle *Brady* reminders that have no effect. No, the Act reflects the need for courts
23 to detail not only what those obligations entail, but also the consequences when
24 those obligations aren't followed—particularly in light of *Bundy* and *Nejad*.

25
26 Because James Cloud's request is reasonable, supported by law, and timely,
27 he respectfully asks the Court to enter an Order consistent with the above-proposed

1 language. Doing so doesn't harm the Court or the United States; it simply helps
2 secure James Cloud's constitutional rights.

3 Dated: November 19, 2020.

4 Federal Defenders of Eastern Washington & Idaho
5 s/ John B. McEntire, IV
6 John B. McEntire, IV, WSBA #39469
7 10 North Post Street, Suite 700
8 Spokane, Washington 99201
9 509.624.7606
10 jay_mcentire@fd.org

11 Service Certificate

12 I certify that on November 19, 2020, I electronically filed the foregoing with
13 the Clerk of the Court using the CM/ECF System, which will notify Assistant
14 United States Attorneys: Thomas J. Hanlon and Richard Burson.

15 s/ John B. McEntire IV
16 John B. McEntire, IV, WSBA #39469
17 10 North Post Street, Suite 700
18 Spokane, Washington 99201
19 509.624.7606
jay_mcentire@fd.org